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No. 90-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL ADVERTISING COMPANY, a Delaware Corporation, subsidiary of Minnesota Mining and Manufacturing, a Delaware Corporation,

Petitioner,

vs.

THE VILLAGE OF DOWNERS GROVE, an Illinois municipal corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the respondent's sign ordinance, which allows noncommercial messages on all signs, fully protects petitioner's rights under the First Amendment to the Federal Constitution.
2. Whether the respondent's sign ordinance bears the necessary rational relationship to its primary goals of aesthetics and safety.
3. Whether the respondent's reasonable regulation of petitioner's signs constitutes a taking of property for which compensation is required.
4. Whether the respondent's amendment of its sign ordinance to allow noncommercial messages on any permitted sign impaired petitioner's contract or due process rights.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PRAYER	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT FOR DENYING THE PETITION:	
I.	
THE RESPONDENT'S SIGN ORDINANCE ALLOWS NONCOMMERCIAL COPY OF ANY NATURE ON ANY OTHERWISE PERMITTED SIGN	10
II.	
THE RESPONDENT'S SIGN ORDINANCE FULLY PROTECTS THE FIRST AMENDMENT RIGHTS OF THE PETITIONER AND ITS ADVERTISERS	12
A. It Is Constitutional To Strictly Regulate Off-Premises Commercial Signs So Long As Noncommercial Messages Are Permitted Everywhere That Commercial Messages Are Allowed	12
B. The Respondent's Sign Ordinance Passes The Test For A Valid Time, Place And Manner Restriction	14

C. The Terms Of Respondent's Sign Ordinance Are Sufficiently Clear To Advise Petitioner And Respondent's Officials As To What Signs Are Permitted 15

III.

THE RESPONDENT'S REASONABLE REGULATION OF PETITIONER'S SIGNS DOES NOT CONSTITUTE A TAKING OF PROPERTY FOR WHICH COMPENSATION IS REQUIRED ... 16

A. The Respondent's Sign Ordinance Is Reasonably Related To The Public Health, Safety And Welfare 16

B. The Regulations Of The Respondent's Sign Ordinance Do Not Constitute A Taking Of The Petitioner's Property Which Requires Compensation 19

IV.

THE RESPONDENT'S AMENDMENT OF ITS SIGN ORDINANCE TO ALLOW NONCOMMERCIAL MESSAGES ON ANY PERMITTED SIGN DID NOT IMPAIR EITHER THE PETITIONER'S CONTRACT OR DUE PROCESS RIGHTS 21

CONCLUSION 24

APPENDIX 1 ..... App. 1

TABLE OF AUTHORITIES

Cases	PAGE
A.E. Brewster v. City of Dallas, 703 F.Supp. 1260 (N.D. Tex. 1988)	13, 17, 18, 19
Central Hudson Gas and Electric v. Public Service Commission, 447 U.S. 557 (1980)	15
City of Champaign v. Kroger Co., 88 Ill.App.3d 498, 410 N.E.2d 661 (4th Dist. 1980)	17
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)	21
Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987)	13
Jackson v. City Council of the City of Charlottesville, Virginia, 659 F.Supp. 470 (W.D.Vir. 1987)	19
Krych v. Village of Burr Ridge, 111 Ill.App.3d 461, 444 N.E.2d 229 (2d Dist. 1982)	17
Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988)	13
Major Media of the Southeast, Inc. v. City of Raleigh, 621 F.Supp. 1446 (E.D.N.C. 1985), *affirmed*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987)	13
Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987)	10, 15, 17, 19
McNulty v. Town of Indialantic, 727 F.Supp. 604 (M.D.Fla. 1989)	20
Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)	16
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	*passim*

Naegele Outdoor Advertising Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) 18

National Advertising Co. v. Village of Downers Grove, 166 Ill.App.3d 58, 519 N.E.2d 502, 116 Ill.Dec. 610 (2d Dist. 1988), *cert. denied*, 121 Ill.2d 572 (1988) 6, 20

National Advertising Co. v. Village of Downers Grove, 204 Ill.App.3d 499, 561 N.E.2d 1300, 149 Ill.Dec. 604 (2d Dist. 1990) *cert. denied*, (1991) 8, 21, 22

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 20

Scadron v. City of Des Plaines, 734 F.Supp. 1434 (N.D.Ill. 1990) 14

Rzadkowolski v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988) 14, 17

Village of Downers Grove v. Clark, 78 CH 422 (18th Jud. Cir. Ill. 1978) 2

Village of Skokie v. Walton on Dempster, Inc., 119 Ill.App.3d 299, 456 N.E.2d 293 (1st Dist. 1983) .. 17

Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) 14, 17

Other Authorities

Constitution of the United States, First Amendment ..... *passim*

The Illinois Highway Advertising Control Act of 1971, *Illinois Revised Statutes*, ch. 121, sec. 501 *et seq.* (1989) ("HACA") 2, 4, 5, 6, 20

Interim Settlement Agreement entered January 16, 1985 ..... 4, 9, 19, 22, 23

1983 Downers Grove Zoning Ordinance 2, 4, 6, 21, 23

1987 Amendment to Downers Grove Zoning Ordinance ..... *passim*

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent, Village of Downers Grove, respectfully prays that a Writ of Certiorari to review the judgment of the Appellate Court of Illinois be denied.

STATEMENT OF THE CASE

Respondent has enacted a Comprehensive Zoning Ordinance which governs the use and improvement of property in the Village of Downers Grove, Illinois ("Downers Grove"). Included in such Zoning Ordinance is Article IX which, together with sign definitions set forth in Article III, governs the erection of signs in Downers Grove, and is referred to as the Downers Grove Sign Ordinance ("Sign Ordinance").

Prior to 1983, the Sign Ordinance prohibited off-premises signs. (R-1165) Respondent amended the Sign Ordinance in response to a decision of the 18th Judicial Circuit Court of Illinois in *Village of Downers Grove v. Clark*, 78 CH 422 (18th Jud. Cir., Ill. 1978), which held that a *prohibition* of off-premises signs was preempted by the Illinois Highway Advertising Control Act of 1971 (*Ill.Rev.Stat.*, ch. 121, sec. 501 *et seq.* (1989)) ("HACA"). (R-1165-1169) In 1983, when petitioner applied for permits for four (4) off-premises or advertising signs, the Sign Ordinance in effect *permitted* off-premises signs in the respondent's least restrictive zoning district, subject to certain size and height restrictions. Petitioner's permits were denied because its proposed signs exceeded the size and height restrictions of the ordinance, and in the case of one application, because off-premises or advertising signs were not allowed in the zone in which the sign was to be located. In this respect, the petitioner is inaccurate in representing to this Court that its proposed signs complied with "all lawful requirements of the respondent's ordinance." (Petition at 7) Such a contention is totally refuted by the petitioner's failure to comply with size restrictions upheld by both the trial and appellate courts below as lawful, reasonable and valid. (R-1467-1471)

Though the Sign Ordinance has been amended from time to time, at all times relevant to this case the following restrictions have been applicable to petitioner's proposed signs:

a) Advertising signs are permitted in the "B-3 General Services and Highway Business District", and in the "M-1 Light Manufacturing District" if the subject property fronts on Ogden Avenue in Downers Grove. (R-98; R-34, 35)

b) Advertising signs are limited in size to 200 square feet in face area. (R-98; R-34)

c) All freestanding signs in business districts, whether on-premises or advertising signs, are limited to 20 feet in height. (R-96; R-33)

d) The total allowable surface area for all on-premises and advertising signs on a lot is determined by the lot frontage. The total area of signs permitted on a zoning lot in the zones where advertising signs are permitted is calculated on the basis of 2 square feet of sign area per foot of lot frontage on all adjacent streets, alleys or other public ways. (R-97-98; R-34-35)

e) There are numerous locations in Downers Grove which are properly zoned for billboards, including three of the four locations where petitioner sought to erect such signs. These locations provide numerous opportunities for the presentation of both commercial and noncommercial messages so long as the size, height, and other zoning restrictions are met. (R-39-40)

At the time of the petitioner's application for permits for its advertising signs, content of signs was restricted to messages related to the business, product or activity

available or conducted on the zoning lot. In addition, advertising signs were allowed in the B-3 zone and on certain properties in the M-1 zone, and political campaign signs were permitted everywhere. (R-96-98) Contrary to the petitioner's contention, permitted on-premises signs were not limited solely to business identification. Noncommercial messages related to the business or activity on the lot and political messages were also permitted on all on-premises signs. (R-97-98) Further, advertising signs could display any message of a commercial or noncommercial nature. The respondent argued below that the Sign Ordinance in effect in 1983 was constitutional in that it treated commercial and noncommercial speech the same, and has never conceded that such ordinance was constitutionally defective. (R-368-371)

Because the petitioner alleged that it would be damaged for every month it was not permitted to erect its signs, in 1984 the parties executed an Interim Settlement Agreement to mitigate such damages. (R-377-384) A complete copy of the Interim Settlement Agreement is attached hereto as Appendix 1. It is apparent from the preambles to the Interim Settlement Agreement that settlement negotiations were predicated primarily on the parties' dispute over the effect of HACA on the applicability of the respondent's sign restrictions to the petitioner's proposed signs, rather than on the constitutional challenges raised by the petitioner.

By the terms of Sections 1 and 3 of the Interim Settlement Agreement, which was entered by the Court on January 16, 1985, the petitioner was permitted to erect three of its proposed signs, with the understanding that if the respondent successfully defended against the petitioner's challenge to the sign restrictions, the signs would be removed. (R-378-381) Section 4 of the Agreement specifically contemplated that the petitioner could be required to

modify its signs to conform to any amendment which the respondent might enact in response to the courts' determination. (R-381) Finally, Section 5 of the Agreement preserved all the respondent's rights and defenses with respect to the validity of the ordinances involved in the litigation. (R-381, 382) The respondent has contended that an amendment during the pendency of the litigation, to clarify the intent of the Sign Ordinance and assure its constitutionality, was not precluded by the agreement and could not prejudice the petitioner in any way.

The petitioner's Third Amended Complaint filed in 1986 contained four counts. (R-969-992) Count I sought administrative review of the denial by the Downers Grove Zoning Board of Appeals of a variation to permit the erection of a sign proposed for one of the proposed sign sites. Count II challenged the Sign Ordinance as preempted by HACA. Count III alleged that the Sign Ordinance violated the petitioner's First Amendment rights, and Count IV challenged the restrictions of the Sign Ordinance as unreasonable and constituting a taking of property without just compensation.

In 1986, the trial court ruled in favor of the petitioner on cross-motions for summary judgment as to Count II of the complaint. (R-432) The result of the court's ruling on Count II was to eliminate altogether any local authority to restrict signage in any manner which was more stringent than the regulations established under HACA. As a result, the respondent requested that the court certify its decision for interlocutory appeal. (R-432) The trial court concurred with the respondent that if its decision was upheld on appeal, any of the other challenges to the sign ordinance which were alleged in the petitioner's complaint would have been unnecessary, and the respondent would have been compelled to permit the petitioner's signs based on the maximum sizes established in HACA. (R-434-435)

The Second District Appellate Court reversed the trial court decision on Count II in *National Advertising Company v. Village of Downers Grove*, 166 Ill.App.3d 58, 519 N.E.2d 502, 116 Ill.Dec. 610 (2d Dist. 1988), *cert. denied*, 121 Ill.2d 572 (1988), holding that the respondent's strict local sign regulation (as opposed to a total prohibition of signs) was not preempted by HACA. Based on this holding, the petitioner's signs were not permitted either under the Sign Ordinance or under HACA which allowed the respondent's sign restrictions.

Though the respondent had contended that the Sign Ordinance in effect in 1983 was constitutional in that it treated commercial and noncommercial speech the same (R-368-371), in 1987, during the appeal on Count II of the petitioner's complaint, the respondent amended its Sign Ordinance to clarify its intent that commercial speech was not to be favored over noncommercial speech, and that noncommercial messages of any nature were to be allowed on any otherwise permitted sign in any zoning district in Downers Grove (see App. D to Petition for Certiorari).

The Sign Ordinance was amended in response to developments in the case law and in hopes of bolstering the respondent's First Amendment argument in another sign case. It was hoped that the amendment would render the plaintiff's First Amendment claim moot, and in fact, the plaintiff in that case dropped its First Amendment claim following adoption of the amendment. (R-795-796)

On remand to the trial court following the appellate court's reversal of Count II, the parties filed cross motions for summary judgment as to the petitioner's First Amendment challenge in Count III of the Third Amended Complaint. (R-12-41; R-175-274) On April 10, 1989, the trial court denied both parties' motions, and ruled that the Sign Ordinance, as amended in 1987, would apply to Count III.

(R-652) Thereafter, the petitioner filed a Fourth Amended Complaint, adding a challenge to the Sign Ordinance in effect in 1987 as part of its First Amendment challenge in Count III. (R-681-700) The respondent again moved for summary judgment, this time as to Counts III and IV of the petitioner's complaint. (R-831-862) The respondent filed affidavits in support of its motion to show that there were numerous locations zoned for advertising signs in Downers Grove, and to clarify the intent of the amendment made to the Sign Ordinance in 1987, that noncommercial signs of whatever nature should be permitted everywhere. (R-852-862; R-795-796) The respondent also moved to dismiss Count I, which sought administrative review of the Downers Grove Zoning Board of Appeal's denial of a variation from the sign regulations. (R-735-736)

On September 7, 1989, the trial court granted the respondent's motion for summary judgment as to Counts III and IV and denied its motion to dismiss Count I. (R-1356) Having considered the petitioner's First Amendment and due process challenges, the court found the 1987 ordinance valid. It is clear from the total record that the trial court adopted the respondent's arguments in support of its motion. (R-1544-1545) On November 14, 1989, the trial court ruled in favor of the respondent on the merits of the petitioner's challenge to the administrative action of the Downers Grove Zoning Board of Appeals in denying a variation for one of the petitioner's signs. (R-1441)

On October 10, 1990, the Second District Appellate Court affirmed the trial court's ruling in all respects, and on February 6, 1991, the Illinois Supreme Court denied the petitioner's request for leave to appeal.

SUMMARY OF ARGUMENT

The petitioner has stated no compelling reasons whatsoever for this Court's exercise of its discretion to hear its appeal. The question of sign regulation under both the First Amendment and the due process clause is well settled, and this Court has denied certiorari in several similar cases interpreting its decision in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981). The respondent's Sign Ordinance, as amended in 1987, clearly protects the First Amendment rights of the petitioner and its advertisers, and is in complete accord with the decisions of this Court and of the various lower federal courts.

The petitioner has incorrectly interpreted the respondent's Sign Ordinance, arguing that it precludes noncommercial copy on signs in any zone except the B-3 zone where advertising signs are allowed. This construction is absurd in light of the 1987 amendment which clearly allows noncommercial copy of any nature on any permitted sign. Both the trial and appellate courts in Illinois resoundingly rejected the petitioner's attempts to twist the meaning of the Sign Ordinance, and recognized that its plain language permits noncommercial speech on any otherwise permitted sign. (R-1537); *National Advertising Company v. Village of Downers Grove*, 204 Ill.App.3d 499, 561 N.E.2d 1300, 149 Ill.Dec. 604 at 609, 611 (2d Dist. 1990), *cert. denied* (1991).

Having passed the strict scrutiny of the court's First Amendment analysis, the Sign Ordinance clearly meets the necessary test which assures that the petitioner's due process rights are protected. Further, as a regulatory ordinance, rationally related to the legitimate governmental

purposes of traffic safety and aesthetics, the Sign Ordinance does not constitute a taking of property for which compensation is required.

Since the 1987 amendment actually assured protection for the petitioner's rights by *adding* a clear right to place noncommercial messages on any sign permitted under the ordinance, the petitioner's argument that it has lost a vested right under either the Sign Ordinance or the Interim Settlement Agreement is without merit. In fact, the respondent's amendment to its Sign Ordinance in 1987 is completely consistent with the terms of the Interim Settlement Agreement. The respondent never waived its ongoing right to amend its ordinances, and the amendment itself benefitted the petitioner by giving it what it claimed it wanted—its First Amendment right to place noncommercial messages on any permitted sign. Because the Agreement specifically contemplated the possibility of amendments to the Sign Ordinance, and provided that such amendments made *after* the litigation could be applied to require the petitioner to modify its signs, the petitioner's situation is unchanged by the respondent's beneficial amendment during the litigation.

Though Rule 10 of this Court's Rules is not intended to control or fully measure this Court's discretion to review decisions, it does set forth the character of reasons to be considered. Petitioner has not shown why this Court's discretion to consider its appeal is warranted, as the decision of the Second District Appellate Court of Illinois is not in conflict with any decision of the Illinois Supreme Court, with any Federal Court of Appeals' decision, or with any applicable decision of this Court. The petitioner also fails to raise any important question of federal law which has not already been settled by this Court. In its Petition to this Court, the petitioner has merely reargued

the merits of its position, which were considered and rejected by the Second District Appellate Court of Illinois, and which were rejected for further review by the Illinois Supreme Court on Petition for Leave to Appeal. There is simply no basis whatsoever for issuing a writ of certiorari in this case.

ARGUMENT FOR DENYING THE PETITION

I.

THE RESPONDENT'S SIGN ORDINANCE ALLOWS NONCOMMERCIAL COPY OF ANY NATURE ON ANY OTHERWISE PERMITTED SIGN.

The 1987 amendment to the respondent's Sign Ordinance made it absolutely clear that noncommercial speech of whatever nature is allowed on any permitted sign. The Sign Ordinance created a specific exception from the restrictions which limit the content of signs to messages related to the "business, product or activity available or conducted on the zoning lot" to allow "noncommercial copy of *any nature*". *Downers Grove Zoning Ordinance*, Art. IX, secs. 4.1-4, 5.1-4, 5.2-4, 5.3-4, 5.4-4. This allowance for all noncommercial messages is totally consistent with this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In fact, the respondent's sign regulations were patterned after the Raleigh sign regulations which were upheld in *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied* 479 U.S. 1102 (1987), following an analysis of the *Metromedia* decision.

In an attempt to create a conflict with this Court's decision in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), the petitioner has totally mischaracterized the provisions of the Sign Ordinance, as amended in 1987. The petitioner claims that the respondent's Sign Ordinance bars noncommercial speech in areas permitting commercial speech. Such an interpretation is not only inconsistent with the plain language of the 1987 amendment to the respondent's Sign Ordinance, but it defies logic to interpret the language of the amendment in this fashion. The 1987 amendment substituted the following language for the Sign Ordinance's previous content restrictions:

> *Except for signs containing noncommercial copy of any nature*, content of signs shall be limited to the business, product and activity available or conducted on the zoning lot. (emphasis added).

Downers Grove Zoning Ordinance, Art. IX, secs. 5.1-4, 5.2-4, 5.4-4. The obvious purpose of this language was to permit any noncommercial message on any allowable sign. For this reason, both the trial and appellate courts found the respondent's Sign Ordinance to be totally consistent with the holdings of *Metromedia*.

In *Metromedia*, this Court found the San Diego sign regulations unconstitutional because they allowed on-premises commercial signs while prohibiting on-premises noncommercial signs, thus offering greater protection to commercial speech than to noncommercial speech. 453 U.S. at 513. In addition, the San Diego ordinance distinguished among noncommercial messages, permitting some as exceptions to the sign regulations while not permitting others. The Court held this to be unlawful content-based discrimination. 453 U.S. at 514.

The trial and appellate courts below were convinced that the respondent's Sign Ordinance is distinguishable from

the defective San Diego ordinance in that it allows any noncommercial message on any sign permitted under the ordinance. This being the case, there can be no conflict with either this Court's ruling in *Metromedia*, or with any of the decisions which have interpreted it.

II.

THE RESPONDENT'S SIGN ORDINANCE FULLY PROTECTS THE FIRST AMENDMENT RIGHTS OF THE PETITIONER AND ITS ADVERTISERS.

There is no significant federal issue presented in this case which has not already been fully addressed by this Court. A sign ordinance which allows commercial on-premises and off-premises signs subject to reasonable size and height restrictions, and which allows noncommercial copy on any sign, fully protects the First Amendment rights of the petitioner and its advertisers.

A. It Is Constitutional To Strictly Regulate Off-Premises Commercial Signs So Long As Noncommercial Messages Are Permitted Everywhere That Commercial Messages Are Allowed.

Upon a careful analysis of this Court's decision in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Second District Appellate Court below correctly held that the respondent's Sign Ordinance does not violate the First Amendment. The appellate court concluded that the plurality of this Court, joined by Justice Stevens in a partial dissent, and Justice (now Chief Justice) Rehnquist and former Chief Justice Burger in dissenting opinions, had agreed that a city could *bar* off-site commercial signs in the interests of traffic safety and aesthetics, while allowing on-site signs. 453 U.S. at 507-512; 541, 553; 559-566;

569-570) The plurality in *Metromedia* also held that a billboard restriction violates the First Amendment if it bars noncommercial advertising on a sign where commercial advertising would be allowed. 453 U.S. at 513. The appellate court in this case upheld the respondent's sign restrictions, because it found that the respondent's Sign Ordinance allows noncommercial copy on any signs otherwise permitted. *National Advertising Company v. Village of Downers Grove*, 204 Ill.App.3d 499, 561 N.E.2d 1300, 149 Ill.Dec. 604 at 609, 611 (2d Dist. 1990).

The appellate court also adopted the viewpoint of the majority of this Court in *Metromedia* that traffic safety and aesthetics provided ample justification for a ban on off-site commercial billboards as a matter of law, that such a ban directly advanced such governmental interests, and that such a ban did not reach further than necessary to achieve its goals. 453 U.S. at 512. This Court relied on the "accumulated, common sense judgments of local lawmakers" in this regard. 453 U.S. at 509. Several courts since *Metromedia* have declined to treat this issue as factual, and have deferred to the legislative body for its determination of whether a regulation or prohibition of off-premises signs is justified by traffic safety and aesthetic concerns. *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108 n.8 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F.Supp. 1446, 1451 (E.D.N.C. 1985), *affirmed*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); *A.E. Brewster v. City of Dallas*, 703 F.Supp. 1260, 1265, n.5 (N.D. Tex. 1988).

Because the respondent's Sign Ordinance allows noncommercial messages of whatever nature on any permitted

sign, the appellate court found it unnecessary to address any First Amendment issue with respect to such messages, because it found the respondent's Sign Ordinance to be fully consistent with this Court's holding in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

B. The Respondent's Sign Ordinance Passes The Test For A Valid Time, Place And Manner Restriction.

The appellate court in the case at hand also upheld the respondent's Sign Ordinance as a valid, content-neutral time, place and manner restriction. Finding that the on-premises versus off-premises distinction is not content-based simply because the determination of whether a sign is permitted is a function of its message, the appellate court applied the test for a time, place and manner restriction to the respondent's ordinance and found it to be valid. See also *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 590-96 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988); *Scadron v. City of DesPlaines*, 734 F.Supp. 1434, 1447-48 (N.D.Ill. 1990); *Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653, 654-55 (6th Cir. 1988). Because non-commercial messages may be placed on otherwise permitted signs throughout Downers Grove, it is clear that ample alternative means of communication exist.

The appellate court correctly upheld the provisions of the respondent's Sign Ordinance and its decision is consistent not only with this Court's holding in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), but with a myriad of cases which have interpreted and followed the reasoning in *Metromedia*.

C. The Terms Of Respondent's Sign Ordinance Are Sufficiently Clear To Advise Petitioner And Respondent's Officials As To What Signs Are Permitted.

The petitioner argues that the absence of any definition of the terms "commercial" and "noncommercial" in respondent's Sign Ordinance renders the ordinance too vague and allows respondent's officials too much discretion to decide which speech to allow and which to prohibit. The Court in *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir., 1986), *cert. denied*, 479 U.S. 1102 (1987) determined that sufficient guidance as to the appropriate meaning of these terms had been provided by this Court's decisions, including *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980). The Fourth Circuit in *Major Media* held that the basic definition of commercial speech as "expression related *solely* to the economic interests of the speaker and its audience" (emphasis added) (See *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. at 561) gave sufficient guidance to Raleigh's officials, and that the infrequent possibility of a marginal question concerning whether speech was commercial or noncommercial in nature was not enough to justify a charge that the Raleigh ordinance was too vague. 792 F.2d at 1272-73.

Similarly, in the case at hand, respondent's officials are provided ample guidance as to the interpretation of the Sign Ordinance, and the risk of improper application is negligible. This is especially true since it is clear from the manner in which the respondent amended its Sign Ordinance in 1987 that its concern is *not* with the content of the speech, but rather with controlling the size and proliferation of signs in the interest of traffic safety and aesthetics.

III.

THE RESPONDENT'S REASONABLE REGULATION OF PETITIONER'S SIGNS DOES NOT CONSTITUTE A TAKING OF PROPERTY FOR WHICH COMPENSATION IS REQUIRED.

The petitioner's attempts to enlarge the due process issues in this case to issues of national scope and interest must certainly fail. The respondent's sign restrictions are rationally related to the public health, safety and welfare and the reasonable regulations of the Sign Ordinance do not constitute a taking.

A. The Respondent's Sign Ordinance Is Reasonably Related To The Public Health, Safety And Welfare.

The respondent has already argued, in the context of the First Amendment issue involved in Count III of the petitioner's Fourth Amended Complaint, that strict sign regulations substantially advance the public interest in aesthetics and traffic safety, as a matter of law. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). To the extent that the regulations of the Sign Ordinance serve to reduce the overall visual clutter, even if in a piecemeal fashion, they are reasonably related to these valid goals. See *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

If a total prohibition of off-premises commercial signs is substantially related to the interests of the municipality in traffic safety and aesthetics under the strict scrutiny of First Amendment analysis, no different result should be reached under a due process analysis of the respondent's strict regulation of off-premises commercial signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 at 521, n.25 (1981).

Contrary to the petitioner's argument that the only reasonable regulation is regulation consistent with the industry's standards, the Illinois courts have already found much more stringent restrictions to be valid. See *Village of Skokie v. Walton on Dempster, Inc.*, 119 Ill.App.3d 299, 456 N.E.2d 293 (1st Dist. 1983); *Krych v. Village of Burr Ridge*, 111 Ill.App.3d 461, 444 N.E.2d 229 (2d Dist. 1982). Further, the respondent's Sign Ordinance is entitled to a presumption of validity. *City of Champaign v. Kroger Co.*, 88 Ill.App.3d 498, 410 N.E.2d 661 (4th Dist. 1980). The petitioner, therefore, has a heavy burden of showing that the Sign Ordinance is unrelated to the public health, safety and welfare, and if there is any possible rational basis for the ordinance, the court's review must be deferential to the legislative decision.

Since various courts have determined that commercial off-premises signs may be prohibited or severely regulated well below the standard industry size signs without violating either First Amendment or due process rights, it is clear that the respondent's restriction of off-premises commercial signs to 200 square feet in size and 20 feet in height is not unreasonable merely because it does not permit the petitioner's 1200 square foot "standard-size" signs. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988); *A.E. Brewster v. City of Dallas*, 703 F.Supp. 1260 (N.D. Tex. 1988); and *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

The Village's Ordinance is also not unreasonable simply because the signs are proposed to be located in commer-

cial and industrial areas which are less than pristine in nature. In fact, the courts have specifically held to the contrary. In *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 174 (4th Cir. 1988), the Fourth Circuit Court of Appeals upheld the Durham ordinance on a motion for summary judgment, finding that the location of billboards in commercial and industrial areas did not preclude the city from relying on aesthetics to justify a ban on commercial off-premises signs.

Finally, the determination of the reasonableness of sign restrictions is not necessarily a factual inquiry, and the trial court properly rejected the petitioner's attempts to diminish the validity of the regulations by the affidavits of its experts. On a motion for summary judgment, the court in *A.E. Brewster v. City of Dallas*, 703 F.Supp. 1260 (N.D.Tex. 1988) recognized the significant burden of overcoming the judgment of legislators as to the appropriate regulations which are needed to achieve the public's goals. It rejected the empirical studies provided by the sign company concerning the relationship of traffic safety and billboards, and concluded that these studies could not substitute for the City's judgment. *Brewster*, 703 F.Supp. at 1265. Even in the face of affidavits from billboard experts to the effect that signs of the size required by local ordinance could not be seen by high speed travelers, the Court deferred to the legislative determination of the City as to the reasonableness of the restrictions. *Brewster*, 703 F.Supp. at 1264-5.

It was this significant burden which the petitioner was required to overcome, and substantial prior case law upholding similar regulations mandated a finding by the trial court that the respondent's Sign Ordinance is not arbitrary and capricious and fully protects the petitioner's due process rights, as a matter of law.

B. The Regulations Of The Respondent's Sign Ordinance Do Not Constitute A Taking Of The Petitioner's Property Which Requires Compensation.

The petitioner argues that the respondent's sign regulations unlawfully take its property without due process. However, if the regulations are reasonably related to the public interest, as argued by the respondent above, a taking of the petitioner's property cannot occur.

It is well settled in the law that a reasonable regulation does not constitute a taking of property in violation of the due process clause simply because it causes some adverse impact on the business of the property owner or lessee. This principle is especially apparent from a review of sign regulation cases. For example, the Western District of Virginia considered a due process challenge in *Jackson v. City Council of the City of Charlottesville, Virginia*, 659 F.Supp. 470, 476 (W.D. Vir. 1987), and upheld sign restrictions even though they deprived the owner of the highest and best use of his property, resulted in a loss of prospective business opportunities, and reduced the fair market value of the signs.

Despite the obvious impact on the sign company's business, numerous courts have held that even an amortization period which requires the elimination of existing previously lawful billboards within a certain period of time does not constitute a taking. *A.E. Brewster v. City of Dallas*, 703 F.Supp. 1260 (N.D. Tex. 1988); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986) *cert. denied*, 479 U.S. 1102 (1987). In this case, however, the signs erected by the petitioner under the Interim Settlement Agreement were not legally nonconforming, and the Village is not seeking to amortize them. Contrary to the petitioner's assertions, the signs *never* conformed to the size restrictions applicable to

them. They also did not conform to the requirements of HACA, since the courts have determined that HACA allows for the enforcement of strict local regulation. *National Advertising Co. v. Village of Downers Grove*, 166 Ill.App.3d 58, 519 N.E.2d 502, 116 Ill.Dec. 610 (2d Dist. 1988), *cert. denied*, 121 Ill.2d 572 (1988).

The court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), held that in order to determine whether governmental regulations go too far, and constitute a taking of property without compensation, it is necessary to consider the character of the governmental action, the interference with reasonable investment-backed expectations, and the economic impact of the regulations. *Penn Central*, 438 U.S. at 124. In the case before this Court, it is clear that the petitioner had no reasonable investment-backed expectations, because it was always on notice that its signs were impermissibly large and high under the respondent's Sign Ordinance. The petitioner holds a leasehold over a small portion of property used for other commercial purposes. Its use of the leasehold for billboards was *always* contingent on its success in challenging the respondent's size regulation on signs, and it entered the leases with full knowledge that the size restrictions precluded its proposed signs. The court in *McNulty v. Town of Indialantic*, 727 F.Supp. 604, (M.D.Fla. 1989), specifically held that one who invests in land and improvements with notice of statutory impediments to its right to use the land as planned cannot justify legitimate investment-backed expectations. *McNulty*, 727 F.Supp at 611. The petitioner's claim that it is entitled to compensation for a regulatory taking is, therefore, defeated by the absence of any legitimate investment-backed expectations.

Further, the respondent's regulation of signs allows signs in a substantial number of locations, subject to reasonable

size and height limitations which are intended to assure the traffic safety and aesthetic interests of the community. Under these circumstances, the petitioner has not established the necessary economic impact, that is, a taking of all viable use of the property as required by *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The respondent's sign restrictions do not result in an unlawful taking of the petitioner's property, and therefore, do not warrant the interest of this Court on review.

IV.

THE RESPONDENT'S AMENDMENT OF ITS SIGN ORDINANCE TO ALLOW NONCOMMERCIAL MESSAGES ON ANY PERMITTED SIGN DID NOT IMPAIR EITHER THE PETITIONER'S CONTRACT OR DUE PROCESS RIGHTS.

The petitioner has argued that it has a "vested right" to erect signs of precisely the size and height it desires, and contends that this right arises from the respondent's application of its allegedly unconstitutional 1983 Sign Ordinance to preclude its signs. The petitioner further argues that the respondent could not amend its sign regulations to assure their constitutionality, and then apply the amended regulations to prohibit its oversized signs.

The trial court and the Second District Appellate Court, respectively, scoffed at this argument as "logically preposterous" (R-1493), "a twist of logic," and "illogical." *National Advertising Company v. Village of Downers Grove*, 204 Ill.App.3d 499, 561 N.E.2d 1300, 149 Ill.Dec.604, 608 (2d Dist. 1990), *cert. denied* (1991). With regard to the 1987 amendment to the respondent's sign regulations, the Second District Appellate Court stated:

> In the first place, National has not *lost* a right it would have had but for the amended ordinance. The amended ordinance did not take away a property right; it *added* one, allowing noncommercial messages on any signs permitted under the ordinance. Secondly, National's permit was not denied because of this alleged unconstitutional provision. National's permit was denied because it proposed to erect a sign that exceeded the size allowed under the ordinance. (emphasis added).

National v. Downers Grove, 149 Ill.Dec. at 608-609.

In addition, the petitioner contends that it relied on the Interim Settlement Agreement and that the respondent's amendment to its Sign Ordinance in 1987 cannot be applied to its signs. In so arguing, the petitioner fails to advise this Court that the damages it waived under the Agreement were damages it claimed it would suffer for lost rent and profits until sign permits were issued. Since its signs were erected pursuant to the Agreement, it has benefitted from the rents and profits on those signs for over six years while its claim was being litigated. It is hard to believe the petitioner has not recovered its costs in that time. In any event, the Interim Settlement Agreement did nothing to guarantee an outcome favorable to the petitioner in this litigation.

The petitioner's argument with respect to its vested right to erect signs is especially ironic, because the 1987 amendment gave the petitioner what it *claimed* it wanted: its full First Amendment rights to place noncommercial copy on any otherwise permitted signs. The Interim Settlement Agreement says nothing and implies nothing concerning the respondent's ability to amend its sign regulations to grant *additional* authority for signage. In fact, paragraph 4 of the Agreement permitted the respondent

to amend its sign regulations in response to a final determination as to the constitutionality of such regulations, and to apply the amended regulations to the petitioner's signs. The petitioner has failed to show how circumstances would be any different *today*, if the 1983 Ordinance had been declared unconstitutional due to insufficient protection for noncommercial speech, and the respondent had amended its sign regulations to correct such a deficiency *after* such a judicial determination. Under the terms of the Interim Settlement Agreement, the size restrictions of the Sign Ordinance would still be applicable to the petitioner's proposed signs, and would still preclude the erection of such signs. The petitioner should have reasonably contemplated the possibility of such an outcome, and erred if it relied on its ability to claim a "vested right" to erect its signs simply because it applied for permits for such signs at a time when *it* believed that the respondent's sign regulations were unconstitutional.

In expending funds to obtain leases and prepare plans and in ultimately constructing the subject signs pursuant to the Interim Settlement Agreement, the petitioner simply took the chance that the respondent might be right, and that its sign regulations would either be held constitutional, or would be amended to render them constitutional. The petitioner did not rely on the continued existence of the provisions of the 1983 Sign Ordinance; it relied on its ability to successfully litigate this case. Its diminished likelihood of success in this litigation as a result of the 1987 amendment to the sign regulations does not give it a vested right to sign permits under any prior ordinance or under the Interim Settlement Agreement, especially since its signs *never* conformed to the valid size restrictions under any version of the Sign Ordinance.

CONCLUSION

The respondent respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari to review the judgment of the Second District Appellate Court of Illinois, as that decision fully conforms to the decisions of this Court and the Federal District and Circuit Courts, and raises no important or unique questions of federal law which have not already been fully addressed.

Respectfully submitted,

BARBARA J. GOSSELAR
Counsel of Record
KUBIESA & POWER, LTD.
5757 South Cass Avenue
Westmont, Illinois 60559
(708) 969-1040

Attorneys for Respondent

APPENDIX 1

INTERIM SETTLEMENT AGREEMENT

THIS INTERIM SETTLEMENT AGREEMENT is entered into on this 14th day of December, 1984, by and between plaintiff, NATIONAL ADVERTISING COMPANY, a Delaware corporation (subsidiary of Minnesota Mining and Manufacturing, a Delaware corporation) (hereinafter referred to as "National") and the VILLAGE OF DOWNERS GROVE, an Illinois home-rule municipality and its ZONING BOARD OF APPEALS (hereinafter collectively referred to as the "Village").

W I T N E S S E T H:

WHEREAS, heretofore National has filed suit against the Village challenging the validity of the Village's denial of permits for the erection of two (2) outdoor advertising signs (hereinafter referred to as the "Signs"); and

WHEREAS, subsequent to the filing of the lawsuit, National has obtained a lease for the erection of a third sign; and

WHEREAS, National's claim rests, in part, on the Illinois Highway Advertising Control Act, 121 Ill. Rev. Stats. Sec. 501, *et seq.*, which statute authorizes erection of signs, such as those proposed by National, of a size up to 1,200 square feet per sign face for double faced advertising signs; and

WHEREAS, it is the position of the Village that its ordinances with respect to the regulation of signs are legal, valid and enforceable, notwithstanding National's claim with respect to the Illinois Highway Advertising Control Act, and it intends to defend the validity in the present lawsuit; and

WHEREAS, National further asserts that the Village's refusal to permit the erection of the signs results in substantial damage to National in terms of lost sign rental revenues; and

WHEREAS, the parties, through their respective attorneys, have met in an effort to negotiate an Interim Settlement Agreement whereby National would be authorized to erect its signs on the properties described hereinbelow during the pendency of this lawsuit, subject to the limitations and reservations contained herein; and

WHEREAS, in exchange for such permission, National will agree to waive any and all claims for damages resulting from the Village's permit denials as specified hereinbelow;

NOW, THEREFORE, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

Section 1: The Village hereby authorizes National to erect signs containing the following dimensions on the property described hereinbelow:

a. A double-face advertising sign, 67 feet in height, with each face being 672 square feet in area, to be located on the following described property:

That part of the southeast quarter of section 30, township 39 north, range 11, east of the third principal meridian, bounded and described as follows; Commencing at the southeast corner of said section 30; Thence north along the east line of said section 30 a distance of 650.39 feet (deed 650.43 feet) to the point of beginning, said point being the northeast corner of lot 4 of Northern Illinois Gas Company York Township Assessment plat no. 1 (document R 64-28042); Thence continuing north along the east line of said section 30, 628.25 feet to the south right of way line of Butterfield Road; Thence southwesterly along southerly line of said Butterfield Road, a distance of 808.00

feet; Thence southeasterly along a straight line, which is at right angles to the southerly line of said Butterfield Road, 950.106 feet to a point in the northerly line of aforementioned lot 4; Thence northeasterly along the northerly right of way line of the Northern Illinois Gas Company, being a curve concave to the southeast, having a radius of 4027.22 feet, a distance of 802.26 feet to the place of beginning, (except from said tract that part conveyed by Warranty deed from Goldblatt Bros, Inc, a corporation of Illinois to the State of Illinois, for the use of the Department of Public Works and Buildings recorded as document R69-46986 and rerecorded as document R69-50820) all in Du Page County, Illinois.

(the "Arun property"). The lease date for such sign is January 17, 1983.

b. A double-face advertising sign, 73 feet in height, with each face being 1,200 square feet in area, to be located on the following described property:

Part of Lot 3 and all of Lot 6 in Lloyd A. Goding's Assessment plat of part of Section 1, Township 38 North, Range 10 East of the third principal meridian, and part of Section 6, Township 38 north, range 11 east of the third principal meridian, according to the plat thereof recorded March 19, 1958 as document 873882, (except that part of said property heretofore dedicated for highway purposes), in Du Page County, Illinois.

(the "Stillwell property"). The lease date for such sign is May 1, 1984.

c. A double-face advertising sign, 73 feet in height, with each face being 1,200 square feet in area, to be located on the following described property:

Lots 1 and 2 in "Ford Leasing Development Co. Assessment Plat", a part of Lot 2 of Assessment Plat No. 3 of lands belonging to Trustees of Joy Morton, deceased, in Section 1, Township 38 north, range 10

east of the third principal meridian, in Du Page County, Illinois.

(the "Madden property")

the support member of such sign to be located directly on the lot line and the sign face projecting so as to extend only over the Madden property. The lease date for such sign is January 20, 1983.

The signs shall be erected substantially in accordance with the plans and specifications attached hereto as Exhibits A, B and C, respectively.

Section 2: In consideration for the permission authorized by Section 1 hereinabove, National agrees:

(a) that it will not erect nor seek permission to erect any other advertising signs within the corporate limits of the Village during the pendency of this action;

(b) that it does hereby waive any and all claims for damages, lost revenue, lost profits, or any other injury against the Village, its officers and officials, including any claims for costs and attorneys' fees against the Village, its officers and employees, which National alleges or may allege resulted from the Village's denial of National's applications to erect signs within the corporate limits of the Village (including, but not limited to, the signs described hereinabove in Paragraph 1), and any other damages with respect to said signs hereinafter accruing.

Section 3: In the event that it is finally determined by this Court (or the Illinois Appellate Court, the Illinois Supreme Court, or the United States Supreme Court, in the event of appeals) that the ordinances of the Village are valid or that for any other reason the Village acted legally and properly in denying National's sign permits, National shall, within thirty (30) days thereafter, remove

the signs erected pursuant to Section 1 hereinabove, or shall conform its signs to all requirements of the Village's ordinances and shall not request any further administrative relief by way of ordinance variation, amendment or otherwise from the Village, or its Boards or Commissions, so as to allow the erection of signs of the dimensions described in Section 1 hereinabove, unless otherwise permitted by the Village.

Section 4: In the event it is finally determined by this Court (or the Illinois Appellate Court, the Illinois Supreme Court or the United States Supreme Court, in the event of appeals) that the ordinances of the Village which regulate the signs described hereinabove are unconstitutional, void, beyond the authority of the Village, or for any other reason invalid, National shall be permitted to maintain such signs or to modify them in accordance with the final ruling or judgment entered in this case, or in accordance with valid requirements of any ordinances adopted by the Village in response to such final determination.

Section 5: This is an Interim Settlement Agreement. The erection of the signs as set forth hereinabove is being authorized by the Village for the sole purpose of mitigating possible damages during the pendency of this action so that a full judicial determination as to the validity of the applicable Village ordinances may be had in a manner that is equitable to both parties. The parties recognize that, in effecting this Interim Settlement Agreement, certain procedural requirements of the Village, sometimes referred to as administrative remedies, including, but not limited to, formal application for Village sign or building permits, requests for ordinance text amendments, variations or special uses, are, as to these signs only, obviated and avoided by the negotiation and execution of this Interim Settlement Agreement. National will

submit to the Village certificates of its structural engineer and its electrician, certifying that the sign installation are, or will be, in compliance with the Village requirements for structure, foundation and electrical wiring. National recognizes that, except as set forth herein, nothing in this Agreement and authorization shall be construed as a waiver by the Village of any rights or defenses with respect to the validity of said ordinances and other matters raised in this litigation.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this 14th day of December, 1984.

NATIONAL ADVERTISING COMPANY

By: /s/ SANFORD M. STEIN by JMP
Sanford M. Stein
Its Attorney

VILLAGE OF DOWNERS GROVE

By: /s/ BARBARA J. GOSSELAR
Barbara J. Gosselar
Its Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE INTERIM SETTLEMENT AGREEMENT AND PROPOSED ORDER were, this 6th day of December, 1984, served upon the following counsel of record. at the address listed below, by Personal Delivery, before 5:00 p.m.:

Barbara J. Gosselar, Esq.
Village of Downers Grove
Civic Center
Downers Grove, Illinois 60515

/s/ SANFORD M. STEIN
Sanford M. Stein

[Filed January 16, 1985]

UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DU PAGE

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, WHEATON, ILLINOIS

NATIONAL ADVERTISING COMPANY, a Delaware corporation (subsidiary of Minnesota Mining and Manufacturing, a Delaware corporation),

-Vs.- Plaintiff, No. 83 MR 332

THE VILLAGE OF DOWNERS GROVE, an Illinois municipality, THE VILLAGE OF DOWNERS GROVE ZONING BOARD OF APPEALS, GREGORY BEGGS, ANTHONY TONZ, EUGENIA KUCERA, LAURENCE MUSIELAK, AND HAROLD SLAGTER,

Defendants.

AGREED ORDER

This cause coming on to be heard on the Joint Motion of the Parties for Leave to File Interim Settlement Agreement, counsel having represented to the Court that the Interim Settlement Agreement, a copy of which has been attached to the Motion, is a fair and reasonable Interim Settlement Agreement and,

the Court understanding that the Interim Settlement Agreement will not dispose of the litigation but will allow the parties to proceed with the litigation under the terms of the Interim Settlement Agreement, and the Court being fully advised on the premises,

IT IS HEREBY ORDERED that the Interim Settlement Agreement of the parties, as evidenced by the attachment hereto as Exhibit "A," is hereby entered of record.

Name SANFORD M. STEIN, ESQ.
DuPage Attorney No. 82557
Attorney for Plaintiff
Address 100 West Monroe Street, Suite 2100
City Chicago, Illinois 60603
Phone 312-382-0800

Enter: /s/ S. BRUCE SCIDMORE
Judge

Date: Jan. 16, 1985